

GREAT AMERICAN GOLD CO.

IBLA 95-40, 95-96

Decided November 6, 1997

Appeals from decisions of the Montana State Office, Bureau of Land Management, declaring mining claims abandoned and void for failure to pay mining claim maintenance fees. MMC 23000, et al.

Affirmed as modified.

1. Mining Claims: Abandonment--Mining Claims: Rental or Claim Maintenance Fees: Generally

Where a mining claimant tenders payment of mining claim maintenance fees via a check that is later returned by the bank because of insufficient funds, the effect is the same as if the fees are not paid. The fees cannot be considered to have been timely tendered in the absence of an acknowledgement by a bank official that dishonor of the claimant's check was due to an error on the part of the bank.

APPEARANCES: Edmund F. Sheehy, Jr., Esq., Helena, Montana, for Appellant.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Great American Gold Company has appealed from Decisions of the Montana State Office, Bureau of Land Management (BLM), dated September 19, 1994, and October 11, 1994, declaring certain unpatented mining claims abandoned and void because Appellant failed to timely pay the maintenance fees for these claims, as required by section 10101 of the Omnibus Budget Reconciliation Act of 1993 (the Act), 30 U.S.C. § 28f (1994) and 43 C.F.R. §§ 3833.1-5, 3833.1-6, and 3833.1-7. 1/ Under the Act, a \$100-per-claim maintenance fee was required to be filed for each claim on or before August 31, 1994, for the 1995 assessment year.

In its September 19, 1994, Decision, BLM declared 173 unpatented mining claims (MMC 23000, et al.) abandoned and void. In an October 11, 1994, Notice, BLM vacated its Decision as to 13 of those claims (MMC 76479 through MMC 76491). On the same date, it issued a Decision declaring an

1/ Appellant also requested stays of both BLM Decisions. By Orders dated Oct. 26 and Dec. 27, 1994, the Board granted the petitions for stay.

additional mining claim (MMC 11138) abandoned and void. 2/ The sum of BLM's adjudications, therefore, was to declare 161 claims abandoned and void. 3/

In its Decisions, BLM states that it received Appellant's check No. 162, in the amount of \$19,700, dated August 27, 1994, on August 31, 1994, but that the check was returned by NationsBank of Tennessee on September 8, 1994, marked "RETURNED-INSUFFICIENT FUNDS." The BLM declared the claims abandoned and void because the maintenance fee was not timely received by August 31, 1994, as required by the Act and regulations.

Appellant contends on appeal that the bank erred in dishonoring its check and that for this reason the claims should not have been declared abandoned and void. Appellant asserts that the bank "erroneously tried to process [check No. 162] through the wrong account and not through the account on which the check was issued." (Notice of Appeal at 2.) Appellant also refers to 43 C.F.R. § 3833.1-3(a), which provides in pertinent part, that "[a] check or negotiable instrument * * * for which payment is not honored by the issuing authority, and such refusal is not an error of the issuing authority, will be deemed to be a nonpayment of the charges or fees for which the check or negotiable instrument * * * was tendered." Appellant contends the regulation is not applicable because the bank erred.

Appellant further contends that this Board's decision in Elinor D. O'Rourke, 130 IBLA 87 (1994), which held that payment of mining claim rental fees by a check that is later dishonored by the bank on which it is drawn does not constitute payment of those fees, is inapplicable because it was issued prior to the publication of 43 C.F.R. § 3833.1-3 on August 30, 1994, and, in the present case, "dishonor of the check was solely through the fault of the financial institution." (Notice of Appeal at 4.)

Finally, Appellant notes that in discussions with BLM, "the Montana State Office was clearly made aware of the fact that the error here occurred on the part of the bank." (Notice of Appeal at 5.)

The record in this case does not support Appellant's allegations. The case record contains copies of several letters to BLM from an assistant vice-president of NationsBank, Knoxville, Tennessee. These letters are in reference to Appellant's account No. 3101056475, stating that Appellant's

2/ The BLM's Oct. 11, 1994, Decision actually addressed two claims, MMC 11138 and MMC 99175. However, by its Decision of Sept. 19, 1994, BLM had already adjudicated MMC 99175 abandoned and void. See "Exhibit A" to that Decision.

3/ Those claims, which are at issue in this appeal, are: MMC 11138, MMC 23000, MMC 23416-MMC 23419, MMC 37180, MMC 37181, MMC 66363-MMC 66374, MMC 71266-MMC 71270, MMC 76492-MMC 76502, MMC 83258-83277, MMC 99175, MMC 100190, MMC 107492, MMC 119953-MMC 119955, MMC 119957-119964, MMC 124873, MMC 124874, MMC 125327-MMC 125354, MMC 151190-MMC 151220, MMC 156377, and MMC 165840-MMC 165867.

check No. 162 in the amount of \$19,700 was returned due to a deposit being made into another account in error and that at the time the check was presented for payment sufficient funds did exist in another account.

The record further contains a document styled "Telephone Confirmation - Briefing Paper," dated September 23, 1994, memorializing discussions between a BLM employee and William Brannon of Great American Gold Company concerning the issue of bank error. In that document, the BLM employee asserts that after explaining to Brannon that the letters from the bank did not indicate that check No. 162 was returned due to bank error, Brannon "finally admitted that an employee made the deposit to the wrong account." The case record contains no further letters from the bank.

Contrary to Appellant's arguments, the record does not show that check No. 162 was returned due to bank error. The letters from the bank's vice-president indicate that Appellant had at least two accounts with the bank and that the account on which check No. 162 was drawn (3101056475) had insufficient funds to cover the check at the time of presentment. Appellant's assertion that the bank attempted to process the check "through the wrong account" is not supported by the record.

[1] In Elinor O'Rourke, *supra*, at 88-89, we observed that "[l]ongstanding Departmental precedent is clear that submission of a check that is not honored by the bank does not constitute payment." See also N.T.M., Inc., 128 IBLA 77, 80 (1993); Twin Arrow, Inc., 118 IBLA 55, 58 (1991). These Decisions are consistent with the regulation at 43 C.F.R. § 3833.1-3(a), referenced by Appellant, which is, in essence, a codification of that policy. The fact that the cited Decisions were issued before the regulation was published does not render those Decisions inapplicable. On the contrary, they are clearly on point and support our affirmance of BLM's action herein. Thus, in the absence of an acknowledgment of error by a bank official, the rule is that a check that is dishonored by the bank on which it is drawn does not constitute payment of the underlying obligation for which it is tendered. See Gary L. Carter (On Reconsideration), 132 IBLA 46, 47 (1995).

The BLM declared these claims abandoned and void. However, under 43 C.F.R. § 3833.4(a)(2), the failure to pay the maintenance fee or file the waiver certification within the time prescribed does not constitute an abandonment of the claims; instead, such a failure "shall be deemed conclusively to constitute a forfeiture" of the claims. Accordingly, under the Act and implementing regulation the claims in question are deemed forfeited.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decisions appealed from are affirmed as modified.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

James P. Terry
Administrative Judge

141 IBLA 173